

COMPLIANCE BOARD OPINION NO. 03-16

August 20, 2003

Bill McCauley
Baltimore County Bureau Chief
The Baltimore Sun

Jim Joyner
Editor, Towson Times
Patuxent Publishing Company

The Open Meetings Compliance Board has considered your complaints alleging that the Board of Education of Baltimore County (“County Board”) violated the Open Meetings Act on May 29, 2003, when it conducted a meeting concerning the renewal of the School Superintendent’s contract without providing notice to the public and without keeping minutes as required by the Act.

For the reasons explained below, we conclude that, although the County Board had a basis under the Act to discuss a new contract for the School Superintendent in a closed meeting, it violated the Act by failing to comply with all of its procedural requirements.

I

Complaints and Response; Supplementary Correspondence

A. Complaints

On June 12, 2003, the Compliance Board received a complaint from Mr. Bill McCauley, the Baltimore County Bureau Chief for *The Baltimore Sun*. The complaint alleged that a majority of the County Board met during the evening of May 29, 2003, to consider renewing the contract of the Superintendent of Schools and the possible terms of a new contract. According to the complaint, several members of the County Board have indicated that the County Board followed its usual procedures to call the meeting to order before closing the meeting to discuss a personnel matter. However, the complaint alleged that the County Board failed to provide advance notice of the meeting to the public and failed to record minutes of its proceedings.

On June 16, 2003, the Compliance Board received a complaint from Mr. Jim Joyner, Editor of the *Towson Times* and Assistant Managing Editor for Baltimore County Operations of Patuxent Publishing Company, submitted on behalf of Patuxent Publishing and eight individual newspapers that Patuxent publishes in Baltimore County. Patuxent also alleged that the County Board failed to provide prior notice of the meeting and failed to keep minutes. Because both complaints raised identical issues, we advised that we would consolidate the complaints for consideration and requested that the County Board provide a single response.

B. Response

Carol Saffran-Brinks, Esquire, an Assistant County Attorney with the Baltimore County Office of Law, submitted a timely response on behalf of the County Board. According to the response, ten of the County Board's twelve members met at the Greenwood Campus on May 29th. The purpose of the meeting was described as follows: "This was the first meeting (of several likely to occur throughout the coming year) to discuss possible reappointment of the Superintendent as well as related discussions regarding components of any future new contract with him."

At the time of the meeting, those members present believed they were engaged in an executive function, and, thus, the procedural requirements of the Open Meetings Act, including its requirements about notice and the keeping of minutes, did not apply. §10-503(a)(1)(i).¹ The County Board noted that it met for approximately two hours. However, a substantial portion of this time, over half according to some members, involved a breakout session where two members of the County Board met separately with the Superintendent. The remaining members present were said to constitute fewer than a quorum; hence, there was no meeting during this period for purposes of the Act.² Furthermore, the remaining members of the County Board did not transact any public business during this period. The County Board indicated that no votes or formal actions were taken and no decisions were reached.

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

² The County Board's response is inconsistent in terms of the number of members present. At one point, the response indicated that ten members were present, while footnote 2 of the response indicated only eight members were in attendance, thus eliminating a quorum during the course of the breakout session. This discrepancy is immaterial, however, because there appears to be no question that a quorum was indeed present for at least part of the session.

The County Board noted that the Superintendent is in his final year of his four-year contract and that State law allows for the reappointment of a school superintendent. §4-201(b)(3) of the Education Article, Annotated Code of Maryland. During this time period, the County Board is engaged in three concurrent processes: (1) evaluating the Superintendent's performance in accordance with the terms of his existing contract; (2) looking ahead toward possible reappointment of the Superintendent for an additional four-year term; and (3) discussion of a new contract, since reappointment could not be accomplished unless the County Board and Superintendent reach agreement on terms of a new contract. The County Board acknowledged that, to some degree, it undertook each process concurrently when it met on May 29 but suggested that the topics be separated for purposes of evaluation under the Open Meetings Act.

The County Board noted that it had discussed the Superintendent's performance, "at least as a predicate for the other discussions." Citing Compliance Board Opinion 01-18 (August 8, 2001), slip op. at 2-3, and Compliance Board Opinion 95-5 (October 18, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 123, 124, the County Board noted that a performance evaluation of a school superintendent by a local board of education is an executive function, outside the scope of the Act. Similarly, relying on Compliance Board Opinion 95-5, the County Board noted that the anticipated reappointment of the Superintendent also is an executive function.

In terms of the third aspect of process, consideration of a new contract, the County Board suggested that, "[a]lthough at first blush, [it] may appear to fall within the scope of the [Open Meetings Act], based on closer analysis of prior decisions of the Compliance Board, that impression is legally incorrect." Specifically, relying on our interpretation of the term "approving or disapproving of an appointment" under the definition of a "legislative function," the County Board noted that the Compliance Board has distinguished between the approval of an appointment, which is a legislative function under the Act, and the making an appointment, which is an executive function outside the scope of the Act. Compliance Board Opinion 95-5. By analogy, the County Board argued that the same distinction must be drawn between the approval of contract, *i.e.*, a contract submitted by the Superintendent for the County Board's approval, versus a contract actually developed by the County Board. The County Board suggested that while the former is a quasi-legislative function, the latter is not. Rather, according to the County Board, it was carrying out its administrative responsibilities under provisions of the State education law, an "executive function" in the parlance of the Open Meetings Act, to which the procedural requirements of the Act do not apply. §§10-502(d) and 10-503(a)(1)(i). The County Board also noted that discussions involved development of a new contract rather than the "amendment of a contract" to which the Open Meetings Act would apply.

The County Board acknowledged that it could have closed a meeting under the personnel exemption of the Act. §10-508(a)(1). “Thus, at most, there was a procedural violation based upon the [County] Board’s failure to follow the mechanical requirements for closing a meeting under [the Act].” In closing, the County Board indicated that it would follow the procedural requirements of the Act in closing future meetings in connection with this matter “unless or until the [County] Board receives guidance from the Compliance Board indicating that the topic fits the executive function exclusion.”

C. Supplementary Correspondence

Following our receipt of the County Board’s response, Stephanie S. Abrutyn, Esquire, counsel to *The Baltimore Sun*, submitted a reply to the County Board’s response. Ms. Abrutyn disputed the County Board’s characterization of the discussion concerning a new contract with the Superintendent as an executive function. *The Baltimore Sun* requested that, in addition to finding a violation of the Act, we “direct the School Board to conduct all future contract discussions in open session, or, if there is a compelling reason why the State’s preference for open sessions ... should be overcome, ... that the procedures for closed sessions, including the provisions for minutes, be strictly followed.”

Following *The Baltimore Sun*’s reply, the County Board responded that the additional relief requested is inconsistent with the Open Meetings Act and unnecessary in light of the County Board’s decision to conduct future meetings in accordance with the Act, pending issuance of our decision.

II

Discussion

A. Applicability of the Act

Because the County Board viewed its May 29, 2003, meeting as involving an executive function, it evidently acquiesced in the complaints’ assertion that advance notice of the meeting was not provided and that minutes of the meeting were not kept. Indeed, these and the rest of the Act’s procedural requirements would not apply if the County Board were correct in its view that, in conducting the meeting, the County Board was engaged in an executive function. §10-503(a)(1)(i).

Nonetheless, if *any* part of the meeting May 29, 2003, involving a quorum of the County Board, went beyond the executive function exclusion, a violation of the Act would have occurred. This result is not altered by the fact that a significant portion of the time involved breakout sessions involving less than a quorum, that

much of the County Board's discussion fell within the exclusion, or that no formal actions were taken by the County Board during the course of the meeting.

We agree with the County Board's position that discussion by the County Board of the Superintendent's performance and potential reappointment would constitute an executive function, outside the scope of the Act. §10-503(a)(1)(i); *see, e.g.*, Compliance Board Opinion 95-5 (October 18, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 123, 124-25. We also recognize that the decision to appoint an individual is inherently linked to the ability to agree on a contract. Nonetheless, the process of contract approval involves a quasi-legislative function under the Act. §10-502(j)(3).

In essence, the County Board's position is premised on a distinction in the role of a public body, recognized in several opinions of the Compliance Board, between making an appointment, which we have concluded is an executive function outside the scope of the Act, and approving or disapproving an appointment made by another official, which is a legislative function under the Act.³ By analogy, the County Board seeks to separate its role in *developing* a contract from its role in "approving or disapproving" a contract; the latter is explicitly defined as a quasi-legislative function under the Act. §10-502(j)(3). Because the County Board was directly involved in development of the contract in accordance with State education law (rather than approving a contract submitted by the Superintendent or staff), the County Board argued that its action is appropriately characterized as an executive function, outside the scope of the Act.

We do not agree. The Compliance Board opinions relied on by the County Board contrast the role of a public body in making an appointment with its role in reviewing an appointment made by another official under applicable law, subject to the public body's approval. In our view, an analogous distinction does not comport with the role of the County Board in contractual matters. The County Board is the corporate entity. §3-104(a) of the Education Article. Whether it is involved in developing a contract or approving a contract recommended by its staff, the contract would be that of the County Board.⁴ There is nothing in this process comparable to

³ Compare, *e.g.*, Compliance Board Opinion 97-14 (August 22, 1997), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 252 with Compliance Board Opinion 03-11 (July 18, 2003), slip op. at 2.

⁴ Under the State education law, "[a] contract made by a county board is not valid without the written approval of the county superintendent." §4-205(d) of the Education Article. In the case of a school superintendent contract, approval apparently would be as a signatory to the contract. Furthermore, the appointment of a superintendent is subject to the written approval of the State Superintendent of Schools. §4-201(c)(2) of the Education Article.

(continued...)

the legally recognized role of another public official in making an appointment. Thus, when a County Board is involved in even preliminary discussions involving its ultimate approval (or disapproval) of a contract, it is engaged in a quasi-legislative function under the Act. Therefore, by definition, it cannot be considered an executive function under the Act. §10-502(d)(2)(v); *see, e.g.*, Compliance Board Opinion 01-18 (August 8, 2001), slip op. at 5 (if local school board discussed or entered into a new contract with school superintendent, or amended existing contract, at closed meeting that was not conducted in accordance with the Open Meetings Act, a violation of the Act would have occurred).⁵

To be sure, due to the nature of negotiations, the County Board may consider it impractical to separate discussion concerning the Superintendent's reappointment and the terms of a new contract. However, as the County Board acknowledged, it is free to close a meeting in which both will be intertwined under the Act's exception for personnel matters. §10-508(a)(1). In our view, if the County Board desires to consider a new contract for the Superintendent in closed sessions, this approach is the only manner by which it can do so in compliance with the Act. What the County Board cannot do is discuss development of a contract as if the Act did not apply.

B. Remedy for Violation

The Baltimore Sun requested that we direct the County Board to undertake certain remedial actions in connection with its future meetings. The Compliance Board is charged under the Open Meetings Act with issuing advisory opinions concerning compliance with the Act. §§10-502.4(a) and 10-502.5(i). We lack authority to compel a public body to take *any* remedial action. *See, e.g.*, Compliance Board Opinion 02-11 (July 12, 2002), slip op. at 2; Compliance Board Opinion 00-5 (June 28, 2000), slip op. at 8.

III

Conclusion

We find that the County Board violated the Open Meetings Act when it met on May 29, 2003, and discussed the development of a new contract for the School

⁴ (...continued)
Article.

⁵ In contrast, a County Board meeting addressing the administration of an existing contract (absent any discussion of amendments) may well constitute an executive function under the Act.

Superintendent in connection with his possible reappointment, without complying with all of the procedural requirements of the Act.⁶

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Walter Sondheim, Jr.
Courtney McKeldin
Tyler G. Webb

⁶ In its response, the County Board noted that, should we find a violation, it should be characterized as merely a procedural lapse, a failure to follow the mechanical requirements for closing a meeting under the Act. Many observers might indeed consider a failure to comply with the Act's procedural requirements to be a venial sin, as compared with the cardinal sin of holding a closed meeting that should have been open, which is not the case here. Nonetheless, in evaluating compliance with the Act, the Compliance Board refrains from characterizing the seriousness or weight of a violation.